Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

Paul Joseph Stumpo

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Sixth Circuit

WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Information Collection Request known as "tax form" 1040 for the Year 2000 is required to comply with the Paperwork Reduction Act of 1995 in every respect?

2. Whether filing a Petition in the United States Tax Court is a "Judicial Action" pursuant to 44 U.S.C. § 3512(b)?

3. Whether the issuance of a Notice of Deficiency by the Internal Revenue Service under authority of 26 U.S.C. § 6020(b) is an act by the Internal Revenue Service "Agency" during the "agency administrative process"?

PARTIES TO THE PROCEEDING

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REFERENCES TO OPINIONS DELIVERED BELOW

The Sixth Circuit affirmed the Tax courts decision (Docket No. 4923-04 DC) in its opinion of November 14, 2005 (Case #05-1252).

A Petition for Rehearing/Rehearing En Banc was filed and a subsequent denial of consideration issued on March 30, 2006 with the Sixth Circuit indicating that they had fully reviewed all aspects of the case.

JURISDICTION

On November 24, 2004, the Tax Court D.C. entered a Decision against Petitioner of which Petitioner appealed to the Sixth Circuit Court of Appeals. On November 14, 2005 the Sixth Circuit Court of Appeals affirmed the Decision of the Tax Court. On March 30, 2006 the Sixth Circuit Court of Appeals denied the Petition for Rehearing/Rehearing En Banc stating that the issue was fully reviewed.

ST EMENT OF THE CASE

This case involves the initial determination by the Commissioner of the Internal Revenue pursuant to 26 U.S.C. § 6020(b) that Appellant was required to supply information upon an information request form known as the "tax form" 1040 with an expired OMB # 1545-0074 which has been expired since it first appeared on the 1981 form in January 1982. Appellant has never disputed that he earned certain money during the year 2000 and only disputes he was required to supply the information to the Commissioner on the expired Form 1040 with a year posted as "2000" based upon the Paperwork Reduction Act public protection provision and the notice written by the Commissioner in the instruction booklet for year 2000.

The erroneous determination by the Commissioner that despite the notice by the Commissioner in the instruction booklet as well as the public protection provision, 44 U.S.C section 3512(1995),led to the

proposed addition to tax of interest and penalties as well as, by the decision of the Tax Court, imposed an additional penalty of $ 7500.00 upon the property rights of Petitioner. Petitioner pursued his right in Tax Court to dispute the additions to the tax on grounds those additions were penalties being sought for failure to supply information upon an expired, invalid, bootleg and outlaw form 1040 information collection request known typically as a "tax form".

Appellant claimed he could not be penalized for not supplying the information at issue for the 2000 year because 44 U.S.C. § 3512 stated that a complete defense for such failure would negate any penalty for failure to supply the information if the request was made upon a form with an invalid OMB number. There can be no question that OMB # 1545-0074 having now appeared for 24 years is a beyond the test qualifying it as an invalid OMB number.

The Commissioner, the Department of Justice Income Tax Attorneys and the Sixth Circuit have not logically disputed that this number is invalid and have simply hung their hats entirely on the absurd notion that the form 1040 does not have to comply with the PRA, when the form has an OMB number, makes a statement on the bottom of the form to locate Notices given in the instruction manual and the instruction manual clearly states that the form must comply with the PRA. This is not to say Petitioner accepts Notice required by law to be on the information collection request can escape the law's requirement by appearing elsewhere, other than on the request itself.

The Sixth Circuit's decision rests upon the theory that the 1040 form is not subject to the Paperwork Reduction Act, and as addressed herein, is in direct opposition to the decision announced in *U.S. v. Wunder*, 919 F.2d 34 (6th Cir. 1990) as well as with other decisions from other Circuit Courts of Appeals as

well as the Supreme Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26, 110 S.Ct. 929, 932-33, 108 L.Ed.2d 23 (1990) as well as the Commissioner's position on the law as described in the instruction booklet for the year 2000 Tax Return 1040.

REASONS FOR GRANTING THE PETITION

1. The current division of the Sixth circuit in its reading of *U.S. v.Wunder*, 919 F.2d 34 (6th Cir. 1990) including Appellant's case with that of the Tenth Circuit in *U.S. v. Dawes*, 951 F.2d 1189 (10th Cir. 1991) leaves the meaning of what Congress entitled "Public Protection" meaningless and the Form 1040 exempt from the Paperwork Reduction Act of 1995.

The Sixth Circuit's decision in Petitioner's case as well as in the *Wunder* Case creates the absurd outcome that depending on what part of the United States you call home, federal laws mean something different depending on the taxpayer's location. Internal Revenue Code penalties are subject to the public

protection provision of the Paperwork Reduction Act ("PRA")(1995) in the 10th Circuit while the same penalties are not subject to the public protection of the PRA in the Sixth Circuit. Petitioner's case with the *Wunder* case goes head to head with *U.S. v. Dawes*, 951 F.2d 1189 (10th Cir. 1991)

The 10th Circuit considered the *Wunder* decision and concluded that

> "We would be inclined to follow the general analysis of Wunder and Hicks and hold that the operation of the PRA in these circumstances did not repeal the criminal sanctions for failing to file an income tax return because the obligation to file is a statutory one. *However, we are not compelled to rest our opinion on the statutory origin theory* because we find the analysis of other courts which have considered the issue to be persuasive."*U.S. v. Dawes*, 951 F.2d 1189, 1191 (10th Cir. 1991)

The 10th Circuit went on to say, "The 1040 form is the information collection request which arguably must

comply with the PRA. It is through the 1040 form that the government obtains all of the tax information it requires..." *Dawes*, supra

It is not disputed that Petitioner, according to the law, cannot be penalized for failure to supply information upon any 1040 form if that form does not comply with the Paperwork Reduction Act[1]. The Sixth Circuit's decision and that of the U.S. Tax Court says that there is no procedure in which a person can even attempt to claim the protection Congress afforded the public under 44 U.S.C. section 3512. Section 3512 was phrased in language "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director [of OMB]"

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[1] 1980 or 1995 along with amendments

In 1995 Congress changed the language to "fails to comply" and "display a valid OMB control number issued in accordance with this chapter."

The 1995 Paperwork Reduction Act amended the Paperwork Reduction Act ("PRA") of 1980 for the purpose of consistency and to overturn this Court's decision announced in *Dole v. Steelworkers* regarding third party information requests. Public Law 104-13 at page 8 by first clarifying that the purpose of the 1980 PRA was to "eliminate exemptions" including exemptions previously demanded by the IRS. PRA, Vol. 2, pg. 171.

Congress clarified at page 216 that it amended section 3512 to "unequivocally cover all collection of information". House Report, Vl. 2, pg 217 (page 54) Congress also made certain that all Federal Agencies, including the Internal Revenue Service, were fully aware of their duty to "display a notice that a person is not required to respond to the collection of information

unless it displays a control number which is valid." Id. @ 248

A clear reading of Form 1040 for year 2000, if this Court construes it as a request for income tax information that the IRS has no other source for within the federal government, shows it displays a number well in excess of the three year limitation placed upon the director by Congress under 44 U.S.C. § 3507(g). It fails to contain the notice required by section 3512 as articulated in section 3512 and as intended by Congress in the House Conference Report. See House Con.Re.No. 104-99, page 36, denoted page 248

Prior to the passage of the 1995 PRA. the 10th Circuit in *Dawes* stated, "As long as the 1040 form complies with the Act, nothing more is required". The form does not comply with the act and violates the PRA mandates on several counts including:

1) The standard deduction, exemption amount, threshold filing number, changes every year but are

never reported to OMB nor are the source of these new numbers provided on any application to OMB;

2) The form has had the same identical expired number for 24 years, 1545-0074 without displaying any expiration date that would time stamp the usage of this number;

3) In 2005 the OMB #1545-0074 has grown wings and taken flight landing on just about every IRS form available further adding to the abuse of this OMB number and calling into attention how a rubber stamp plays against the terms of the 1995 Act of "valid".

4) The forms from 1981 through 1995 did not contain a statement that the form was not subject to the PRA, and the Forms since 1995 have not contained the statement that a person is not required to respond to the collection of information unless it displays a control number which is valid

With all these undisputed violations infecting Form 1040, Petitioner had a legitimate claim to raise under

section 3512 within Tax Court to oppose the Commissioner's claims advanced under 26 U.S.C. § 6020(b) and the Tax Court holding otherwise was in error.

2. The current division of the Sixth Circuit with the Supreme Court in *Dole*.

The Supreme Court has previously held:

> Typical information collection requests include tax forms, Medicare forms, financial loan applications, job applications, questionnaires, compliance reports, and tax or business records. See S. Rep., at 3-4. These information requests share at least one characteristic: The information requested is provided to a federal agency, either directly or indirectly.

Dole v. United Steelworkers, 494 U.S.26, 33(1990).

That the information collection request form known as the tax form 1040 is not subject to the PRA is a position without any logic or reasoning, unless the form 1040 is not consider a "tax form". This Court in *Dole*

went on to say " In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty. See 44 U.S.C. § 3512 (1982 ed.).[fn6]" with foot note six providing this further clarification of the public's authority and right "(The Act "allow[s] the public, by refusing to answer these [information collection requests], to help control `outlaw forms'").

It seems that so long as a Petition in Tax Court is filed based upon the IRS decision to issue a Notice of Deficiency under its determinations pursuant to section 6020(b), the Tax Court Petition created a "judicial action" Congress allows a PRA defense to be raised. Tax Court disagreed and so does the entire 6th Circuit.

3. The current division of the Sixth Circuit with the Intentions of Congress with regard to the PRA.

Congress in 1995 strengthened and clarified their position with regard to the PRA and third party collections discussed in Dole clarifying the public's

rights and protections. The committee states as recorded in the United States Code Congressional and Administrative News, 104th Congress – First Session 1995 on page 168 "The Committee on Government Reform and Oversight, nearly 20 years later, agrees and believes that more must be done to restore the American People's Faith in their Government. The Paperwork Reduction Act of 1980, being the first step toward that goal,.."

The committee then strengthens the PRA's stand with regard to third party collection, to include these in the PRA's venue stating on page 175 that "the Committee believes that the Court misreads Congress' intent in enacting the 1980 Act. H.R. 830 overturns the *Dole* decision and includes third party disclosure requirements within its provisions ".

The reports highlights the aspects of the 1980 PRA with the following statement on page 171:

> The act strengthen the Federal Reports act paperwork clearance process by:

> (1) consolidating paperwork control in OMB; (2) eliminating exemptions from review for several agencies (e.g. **the Internal Revenue Service**)..." and continuing on to say "(4) creating a public protection provision providing that no penalty may be imposed on a person who fails to respond to an unapproved paperwork requirement"

These words by Congress cannot be misconstrued in any way; the Internal Revenue Service finds no exemptions for their information collection from the PRA. Going on to specifically addressing public protection, the Committee states on page 216:

> The intended scope, purposes, and requirements of section 3512's current provisions on public enforcement... are unchanged...Court decisions have affirmed that the section's intended protection can be asserted effectively in empowering members of the public to defend themselves against unapproved collections of information... The committee supports this provision

> and the purposes for which it was originally enacted ...

Here, Congress clearly and unequivocally intended to proclaim the IRS was given no pass or exemption regarding information collection request form 1040.

4. The current division of the Sixth Circuit with the Commissioner of the Internal Revenue.

The Sixth Circuit court of Appeals, relying on the *Wunder* case, further states in their decision in the Petitioner's case that the requirement is based on statue and not regulation and therefore the PRA does not apply to the 1040 tax form. This is in direct opposition to the Commissioner's own words in the instruction manual for the year 2000 1040 tax form on page 56 which states:

> Our legal right to ask for information is Internal Revenue Code sections 6001, 6011, and 6012(a) and their regulations. They say that you must file a return or statement with us for any tax you are

> liable for. Your response is mandatory under these sections.

The commissioner believes and states here that the requirement does come from regulations and not simply a lone single provision of the Internal Revenue Code and therefore the PRA must apply. The Sixth Circuit in Petitioner's case went on further to state that the exemption amount that is the triggering mechanism for 6012, of which is being relied upon by the Sixth Circuit in *Wunder* and the Commissioner for demand that a return be made, comes from a Revenue Procedure. The Sixth Circuit decided that "as noted in Rev. Proc. 99-42" the "exemption amount is "2800.00". A Revenue Procedure is neither a statue nor a Regulation and surely means that the command to make a return comes from a mixture of statue and agency action, which is the reason that Congress enacted the PRA. At the core of this case is the dispute between this Court and other Circuits regarding the "statutory origin theory" that

purports to derive the "requirement to file a return" ("because the requirement to file a tax return is mandated by statute") quoting *Wunder* at 38.

Wunder holds that section 6012 is the hinge pin for his section 7203 violations. The Supreme Court has stated more than once "In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Bryan v. U.S.* , 524 U.S. 184, 194 (1998); quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)

Section 6012 is entitled "persons required to make returns of income". This section explains its terms in phrases like "it shall be made" and that this section applies to persons earning or exceeding income levels over the "exemption amount". See 6012(a)(1)(A). It is also clear that no person is required to make a return and no penalty would apply if a person's income did

not exceed the "meaning given such term by section 151(d)". See 6012(a)(1)(D)(ii). Section 151(d) has assigned no "meaning" to the phrase "exemption amount" for the year 2000. The Sixth Circuit decided that "as noted in Rev. Proc. 99-42" the "exemption amount is "2800.00"

Nowhere in section 6012 is any reference made to any "Revenue Procedure". Section 6012(a)(1)(D)(ii) never articulates or directs any person to see any Revenue Procedure. The law cannot be a revenue procedure. The Supreme Court in *Bryan* and *Cheek* did not say the Jury must find the Defendant was aware of a Revenue Procedure. The Supreme Court said "specific provision of the tax code". *Bryan*, supra

Yet the Sixth Circuit says that Petitioner was frivolous and it was not an abuse of discretion for the Tax Court to hold in favor of the Commissioner's imposition and claim of penalties against Petitioner for his failure to not timely supply information on an

information request form because the "requirement to file a return" derives from "statute". *Wunder*, @ 38.

On page 56 of the Commissioner's self authenticating document called 1040 Instruction Booklet, this Court will find these statements made by the Commissioner of the IRS,

> The IRS Restructuring and Reform Act of 1998, the Privacy Act of 1974, and the **Paperwork Reduction Act of 1980** require that when we ask you for information we must first tell you our legal right to ask of the information, why we are asking for it, and how it will be used.

The instruction manual requests no information and has been determined by many courts to not have a PRA requirement, therefore this statement is clearly speaking of the 1040 tax form to which the instruction manual provides guidance.

Furthermore, the instruction booklet for 2000 is making reference to the public of the 1980 PRA and

not the 1995 PRA. Just so Petitioner is perfectly clear on this subject, Petitioner points this Court to Revenue Ruling 2006-21, issued on April 10, 2006, by Chief Counsel for the Internal Revenue Service, that says the 1980 PRA is controlling and not the 1995 PRA.

Then the Commissioner provides this statement, "You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number."

This statement just quoted by the Commissioner has been and still is Petitioner's position for which Petitioner has been scolded (or fined) by every branch of Government to which Petitioner has made this statement. These statements plainly indicate that the PRA applies to the 1040 form and that if the OMB control number on the form is NOT valid that Petitioner is protected from any penalty, with the

Commissioner adding the statement that Petitioner does not have to provide the information.

The PRA is codified in title 44 sections 3500. Section 3507(g) specifically provides that a control number can be used for no more than 3 years. The 1040 form has had the same number, 1545-0074, since 1982 and therefore has had the same number for 24 years and therefore is not valid.

Here we find that a number that is determined to expire in at most 3 years never expires but changes each year on a entirely different (each form having a different standard/exemption amount on the backside of the form and a different year) collection of information request. Since each year's form is completely different, proper approval of OMB is required since the OMB number becomes the purported approval number assigned to that form. Petitioner could not submit a year 1999 form for the year 2000,

however, the forms have the same identical identification number assigned.

Title 44 Section 3512 (1995) states that:

> A. Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if--
>
> i) The collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or
>
> ii) The agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

The language of section 3512 at the time of the passage of the decision announced in *Wunder* required all forms that an agency believed were not subject to the PRA, were required to state on the form that the request was not subject to the PRA. The Sixth Circuit's decision in *Wunder* renders "or fails to state

that such request is not subject to this chapter" meaningless.

It should be clear by the changes made to the PRA public protection provision that Congress removed this language from section 3512 because no agency was exempt.

It is not disputed by the Government that the form 1040 contains the purported number 1545-0074.The Government has not even disputed whether it is valid. They only dispute whether the form 1040 is subject to the Paperwork Reduction Act. The 1040 form for 2000, which contains the same worn out expired number 1545-0074 does not contain any statement that says "this request is not subject to the Paperwork Reduction Act." How could a request for information that presents itself to have complied with the Paperwork Reduction Act be then held by the Sixth Circuit that it "is not subject to the Paperwork Reduction Act"? It is simply not logical and clearly

discretion is being abused. How would the public know? They would not.

It is not disputed that Petitioner, according to the law, cannot be penalized for failure to supply information upon any 1040 form if that form does not comply with the Paperwork Reduction Act. Both *Dawes* and *Wunder* were dealing with the repeal of criminal penalties while the penalties at issue between Petitioner and the Commissioner of the Internal Revenue and now the U.S. Tax Court, are civil penalties, not criminal. Please do not miss understand Petitioner. Petitioner claims that section 3512 prohibits, not repeals, any penalty, criminal or civil, if the alleged act derives from claims that include the willful failure to supply information to the requesting agency so long as the agency's request complained of does not comply with the law.

5 CFR 1320.3(j) as well as the PRA of 1995 at 44 U.S.C. § 3502(14) defines "penalty" as to "a fine or

other punishment; a judgment of monetary damages or equitable relief; or the revocation, suspension, reduction, or denial of a license, privilege, right, grant, or benefit."

It seems simple and logical that an American Citizen cannot be penalized for failure to act when the act he is claimed to have failed to do, was not required by law (statutory origin, specific provision of the tax code, knowledge of the law).

26 U.S.C. section 6651 defines "addition to tax" as in case of failure "to file any return required..." Section 6654 is couched in language as a penalty for failure to pay tax and is described as an "addition to the tax". The Sixth Circuit states "Stumpo clearly did not dispute the amount of taxes he must pay". The dispute was however when and how those taxes were to be communicated and paid. Though this may technically be true, Petitioner did dispute the "additions" to the "tax" and the Sixth Circuit directs Petitioner to no other

place where Petitioner has the forum to dispute these additions. It can hardly be said with out a wink and a nod that these "additions" to the tax are different than the type of "penalties" at issue in 44 U.S.C. section 3512.

5. Tax Court is a Court required to consider PRA violations advanced by Petitioner challenging validity of OMB number on Form 1040.

Tax Court is given jurisdiction by Congress over Notice of Deficiency procedures under 26 U.S.C. § 6213. What gave rise to this jurisdiction is the Commissioner's exercise under 26 U.S.C. § 6020(b). Congress even allows the burden to shift involving penalties in "any court proceeding" under 26 U.S.C. § 7491(c).

Congress, under section 3512 (PRA 1995) mandates that the PRA "public protection" is allowed as a complete defense, bar or otherwise, at any time

during the administrative process or any judicial action applicable thereto.

Tax Court is a Court of limited jurisdiction but it is a type of Court. Congress has limited its jurisdiction and prevented Tax Court from being a Court in equity. The Petition filed by Petitioner with Tax Court qualifies as a "judicial action" and the Tax Court was in error to refuse to consider Petitioner's claims of invalidity regarding the requirement to file Form 1040 with OMB # 1545-0074.

The Sixth Circuit was in error when it decided to uphold the Tax Court's decision premised on the Sixth Circuit's "statutory origin theory" while in the Sixth Circuit's unpublished opinion in this case, the panel determined the trigger to section 6012 is written by the IRS under "revenue procedure".

Revenue Procedure is not a "command of the legislature" and subjects IRS to OMB approval. The Tax Court also failed to consider the changes made to

the 1995 PRA when deciding its decision based upon the 1980 PRA. The IRS circulated a "revenue ruling" dated April 10, 2006, in which it stated its position on the PRA was stemming from the 1980 PRA.

It must be clear that the statutory origin theorists are ignoring what was not in law prior to the PRA of 1995 as well as ignoring the reasons for the changes in the PRA of that was enacted to settle any debate on this issue.

There are no exemptions and section 3512 is a "complete defense."

CONCLUSION

THEREFORE, Petitioner Paul Joseph Stumpo, respectfully requests this Supreme Court Grant Petitioner's Petition for Writ Certiorari to review and uphold the wishes of Congress to provide the public with protection from any agency, including the Internal Revenue Service, involving issues raised in Tax Court, or any Court, civil or criminal, that are relevant to the

PRA, when claims of invalidity are advanced by the person the agency seeks to penalize.

Respectfully submitted,

/s/ Paul J. Stumpo, Pro Se

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PAUL JOSEPH STUMPO,
Petitioner
v.
CIR
Respondent

ORDER OF DISMISSAL AND DECISION

On November 8, 2004, this case was called from the Calendar for the Trial Session of the Tax Court at Washington, D.C. Petitioner and counsel for respondent appeared and reported that the case was for trial. The Court advised the parties that on 25, 2004, respondent timely submitted to the Court respondent's pretrial memorandum and that on November 5, 2004 , Petitioner untimely submitted to the Court pretrial memorandum. The Court informed petitioner that the pretrial memorandum contained statements, contentions, and arguments that the Court found to be frivolous and/or groundless. The Court reminded petitioner that section 6673(a) (1) of the Internal Revenue Code (I.R.C.) states in pertinent part:

> Whenever it appears to the Tax Court that -
> (A) proceedings before it have been or maintained by the taxpayer primarily for delay, [or]

(B) the taxpayer's position in such proceedings is : frivolous or groundless, * * *

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

Court also informed petitioner at the calendar call that in the event that petitioner continued to advance frivolous and/or groundless statements, contentions, and/or arguments, the Court would be inclined to impose a penalty not in excess of $25,000 on him under I.R.C. section 6673 (a) (1).

Despite the Court's admonition petitioner about I.R.C. section 6673(a) (1), petitioner indicated to the Court that he intended advance at trial the same types of arguments that he had advanced in petitioner's pretrial memorandum. The Court again admonished petitioner about I.R.C. section 6673(a) (1).

Thereafter, petition indicated again that he intended to advance at trial the same types of arguments that he had advanced in petitioner's pretrial memorandum. The Court once again admonished petitioner about I.R.C. section 6673(a) (1).

Respondent's counsel orally moved the Court to dismiss this case for failure to prosecute properly. The Court directed respondent's counsel to file on November 8, 2004, a written motion to dismiss this case for failure to

prosecute properly, which respondent did. (We shall refer to respondent's written motion to dismiss this case for failure to prosecute properly as respondent's motion.) On November 9, 2004, respondent filed a supplement to respondent's motion, in which respondent indicated that respondent had conceded certain determinations that respondent had failed to reflect in respondent's motion.

The Court finds that petitioner instituted and maintained his case primarily for delay and that petitioner's position in this case is frivolous and/or groundless. After due consideration, and for cause appearing more fully in the transcript of the proceeding, it is

ORDERED that the Clerk of the Court shall file as November 8, 2004, petitioner's pretrial memorandum and respondent's pretrial memorandum. It is further

ORDERED that respondent's motion filed on

November 8,2004 as supplemented on November 9, 2004, is granted and this case is dismissed for failure to prosecute properly. It is further

ORDERED and DECIDED that for the taxable year 2000 there are due from petitioner the following deficiencies in, and additions to, petitioner's Federal income tax:

Additions to Tax I.R.C. Sections **Year** 2000
Deficiency
$36,289.00

6651(a) (1)
$9,072.25
6654
$1,938.37

It is further
ORDERED and DECIDED that, pursuant to I.R.C. section 6673 (a) (1), petitioner shall pay a penalty to the United States in the amount of $7,500.

(Signed) (Carolyn P. Chiechi)
Judge

Entered: Nov 24, 2004

App. 5

No. 05-1252

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed

PAUL JOSEPH STUMPO,

Petitioner-Appellant,

v.

COMMISSIONER
OF INTERNAL REVENUE,

Respondent-Appellee.

Nov 14 2005 ***LEONARD GREEN, Clerk***

Before: MERRITT, MOORE, and SUTTON, Circuit Judges.

Paul Joseph Stumpo, a Michigan taxpayer proceeding pro se, appeals a Tax Court judgment dismissing his petition for failure prperly to prosecute the petition and sanctioning Stumpo $7500 for instituting proceedings that are frivolous and

groundless. This case has been referred to a panel of the court pursuant to Rule 340)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Stumpo did not file an individual income tax return for the 2000 tax year. On December 19, 2003, the Internal Revenue Service (IRS) sent Stumpo a notice of deficiency letter, finding a deficiency in income taxes for the 2000 tax year and assessing a penalty for failure to file a tax return and an adjustment for failure to pay estimated tax. Stumpo filed a petition in the Tax Court acknowledging that he earned money during the year 2000, but disputing the additions to tax and penalties assessed against him.

At the hearing, the Tax Court judge informed Stumpo that the legal arguments in his pretrial memorandum were frivolous and warned Stumpo that the court could order him to pay a penalty if the continued to advance these frivolous arguments. When Stumpo continued to press his arguments, the Commissioner moved to dismiss for failure properly to prosecute. The Tax Court granted the Commissioner's motion to dismiss and imposed a penalty against Stumpo pursuant to 26 D.S.C. § 6673(a) in the amount of$7500. This appeal followed. On appeal, Stumpo

asserts that he was not required to file a form 1040 because it had an expired OMB number; that he could not provide such information because the exemption amount is not included in the statute; that he did not fail to prosecute the petition because he appeared at the hearing and attempted to argue his claims; and that he should not have been sanctioned by the Tax Court. The decision is affirmed for the reasons stated by the Tax Court. Generally, this court reviews the Tax Court's conclusions laws de novo and its findings of fact for clear error. *See Zack* v. *Comm'r,* 291 F.3d 407,412 (6th Cir. *2002);MTS Int'/ Inc.* v. *Comm'r,* 169 F.3d 1018,1021 (6th Cir. 1999). However, this court reviews for an abuse of discretion the Tax Court's dismissal of a petition for failure to prosecute, because it is analogous to a district court's ruling for failure to prosecute. *Colon* v. *Comm'r,* 252 F.3d 662, 662-63 (2d Cir. 2001); *Watson* v. *Comm'r,* 690 F.2d 429,430 (5th Cir. 1982); *Litt/e* v. *Yeutter,* 984F.2d 160,162 (6th Cir. 1993). This court also reviews for an abuse of discretion the Tax Court's assessment of a penalty under Internal Revenue Code § 6673. *Wolfv. Comm'r,* 4 F.3d 709, 716 (9th Cir. 1993). A petition is subject to dismissal under Rule 123(b) of the Tax Court Rules for failure properly to prosecute. That rule states: "For failure of a petitioner properly to

prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner." To evaluate the Tax Court's dismissal for failure to prosecute, this court must consider: 1) whether the party's failure to cooperate is due to willfulness, bad faith, or fault; 2) whether the adversary was prejudiced by the dilatory conduct of the party; 3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and 4) whether less drastic sanctions were imposed or considered before dismissal was ordered. *Stough* v. *Mayville Cmty. Sch.,* 138 F.3d612, 615 (6th Cir.1998). The court must balance the party's interest in being heard against its opponent's interest in avoiding delay and the court's interest in managing its docket. *Colon,* 252 F.3d at 663.

Although Stumpo did appear at his hearing and attempt to assert his arguments, he disregarded the Tax Court judge's admonitions that his arguments did not address his deficiency and that they would not be entertained by the court because they were frivolous. ill spite of these admonitions, Stumpo refused to make any factual allegations challenging the deficiency and instead pressed the already discounted legal arguments. The court had an interest in managing its docket and

ensuring that its time was not wasted on frivolous theories. Thus, the court did not abuse its discretion.

Stumpo's argument that he need not file a tax form because the Form 1040 for tax year 2000 had an invalid OMB number is frivolous. "[T]he requirement to file a tax return is mandated by statute, not by regulation," and thus is not subject to the Paperwork Reduction Act. *United States* v. *Wunder,* 919 F.2d 34,38 (6th Cir. 1990). In addition, the OMB has assigned control numbers to the regulation requiring the filing of Form 1040. *See* 60 Fed. Reg. 39780 (Aug. 3, 1995). Stumpo's argument that he could not file a return because the amount of the exemption did not appear in the statute is also frivolous. The amount appears in Internal Revenue Code § 151 (d), where the exemption amount is $2000, plus inflation adjustments. The exemption amount for the year 2000 was $2800 as noted in Rev. Proc. 99-42 § 3.09, 99-2 C.B. 568,571.

The Tax Court also did not abuse its discretion in assessing a penalty against Stumpo for instituting proceedings that were frivolous and/or groundless. Stumpo clearly did not contest the amount of taxes he must pay; he simply objected to the form on technical reasons. The Tax Court may penalize taxpayers who refuse to address the merits of their cases or persist in making frivolous

arguments despite warnings. *Sandvall* v. *Comm'r,* 898 F.2d 455, 457, 459 (5th Cir. 1990); *see also Wright* v. *Comm'r,* 752 F.2d 1059, 1061-63 (5th Cir. 1985); *Crain* v. *Comm'r,* 737 F.2d 1417 (5th Cir. 1984). The court repeatedly warned Stumpo that his arguments were frivolous and yet he persisted. Thus, the court did not abuse its discretion in imposing a penalty upon Stumpo.

The Commissioner now moves for a lump sum sanction in the amount of $6000, arguing that Stumpo's appeal is frivolous and that $6900 approximates the amount of expenses that it has incurred in other tax protestor appeals. *See* Fed. R. App. P. 38; *Schaffner* v. *Camm'r,* 812 F.2d 292, 293 (6th Cir. 1987). The Commissioner notices that Stumpo filed this appeal after the Tax Court imposed a penalty in the amount of $7500 on the grounds that his arguments were frivolous. Stumpo has responded to the motion, asserting that the appeal is not frivolous, and that he has a legal right to appeal a lower court's decision. Although Stumpo's tax protestor arguments are frivolous, it would not have been clear to a pro se appellant that his petition should have been dismissed for failure to prosecute. Thus, sanctions are not appropriate in this case. For the foregoing reasons, the Tax Court's decision is affirmed, and the motion for

sanctions is denied. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

No. 05-1252

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed

PAUL JOSEPH STUMPO,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

March 30 2006 LEONARD GREEN, Clerk

Before: MERRITT, MOORE, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied

ENTERED BY ORDER OF THE COURT

Lenonard Green, Clerk